IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *EX REL*. W.A. DREW EDMONDSON, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF OKLAHOMA AND OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, IN HIS CAPACITY AS THE TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,

Plaintiffs,

v.

TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC. AND WILLOW BROOK FOODS, INC.,

Defendants.

Judge Gregory K. Frizzell
Magistrate Judge Sam A. Joyner

CASE NO.: 05-CV-00329 GKF–SAJ

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES , LEGISLATIVE HISTORY & REGULATIONS

STATE STATUTES

REGULATIONS

OTHER AUTHORITIES

Defendants hereby respond to the "Motion for Preliminary Injunction" ("Motion").

INTRODUCTION

Contrary to Plaintiffs'[1] allegations in the Motion, the Illinois River Watershed ("Watershed" or "IRW") is not in a public health crisis. In fact, the State's own data and actions outside of this lawsuit contradict Plaintiffs' allegations.

Outside of this lawsuit, the State asserts that the Watershed is healthy and pristine. The State strongly encourages the public to enjoy the Watershed and makes the Illinois River available for a variety of uses. Outside groups agree with the State's assessment that the Watershed is healthy. *See* Ex. 1 (materials from Oklahoma agencies and others promoting the Watershed). Moreover, the State's public health officials agree that there is no bacterial health crisis in the Watershed. Those officials have issued no alerts to the citizens of Oklahoma to warn them of any dangerous levels of bacteria in the IRW. Indeed, even within the bounds of this case, Plaintiffs admit that they cannot identify *a single person* who has *ever* contracted *any* illness from poultry litter.

Outside of this lawsuit, the State recognizes that poultry litter is not a "solid waste" within the meaning of RCRA. Through the Oklahoma Department of Agriculture, Food and Forestry ("ODAFF") the State monitors and regulates land application of poultry litter in the Watershed. ODAFF has taken no action to bar or restrict litter applications and in fact continues to issue permits that authorize the very poultry litter applications that Plaintiffs' Motion asks the Court to enjoin. Indeed, the State actively promotes the use of poultry litter as a fertilizer or soil

[1] As will quickly become clear, Plaintiffs' lawsuit filed on behalf of the State of Oklahoma is significantly at odds with the views held by the Oklahoma officials who have responsibility for monitoring public health and water quality and regulating poultry litter. To distinguish these points of view, we refer to the Motion and its litigating positions as "Plaintiffs" and the rest of the Oklahoma state government as "the State" or "Oklahoma."

conditioner[2] both within and without the Watershed.

The disconnect between Plaintiffs' Motion and the data and actions of the relevant state officials is unsurprising. Prior to filing its suit, Plaintiffs did not consult the Oklahoma agencies and officials with authority over poultry litter or public health issues. Nor did Plaintiffs consult the appropriate Oklahoma officials before incorrectly asserting that poultry litter is a RCRA "solid waste," or that the Watershed has dangerous levels of bacteria from poultry litter. If Plaintiffs' counsel had discussed these matters with the state officials who are charged with handling them on a daily basis, Plaintiffs would have learned that the essential allegations of their Motion are incorrect.

ARGUMENT

Plaintiffs have failed to meet the standards for a preliminary injunction and this Court should deny their Motion for several reasons. First, Congress and the EPA have clearly and repeatedly said that animal manure used as a fertilizer or soil amendment is not a RCRA "solid waste." Plaintiffs' Motion must be denied on this basis alone. Second, Plaintiffs cannot demonstrate that poultry litter poses an "imminent and substantial endangerment" to human health. Third, Defendants are not subject to "contribut[ing] to" liability under RCRA. Fourth, Plaintiffs' attempt to prove a link between poultry litter and risk to humans is based on lawyer-driven, novel and flawed science. Fifth, Plaintiffs cannot demonstrate the existence of an

[2] Fertilizer is "any substance used to fertilize the soil." A "soil conditioner" is "any of various organic or inorganic materials added to soil to improve its structure." *Random House Unabridged Dictionary*, 710, 1814 (2005). *See also Glossary of Soil Science Terms*, available at https://www.soils.org/sssagloss/index.php (defining fertilizer as "[a]ny organic or inorganic material of natural or synthetic origin (other than liming materials) that is added to a soil to supply one or more plant nutrients essential to the growth of plants"; and soil amendment as "[a]ny material such as lime, gypsum, sawdust, compost, animal manures, crop residue or synthetic soil conditioners that is worked into the soil or applied on the surface to enhance plant growth. Amendments may contain important fertilizer elements but the term commonly refers to added materials other than those used primarily as fertilizers."). A product can be used as either or both.

irreparable injury that will occur absent an injunction. Finally, the sweeping injunction Plaintiffs request is not in the public interest because it would set aside the regulatory systems of two States and damage non-party farmers who grow poultry under contract with Defendants ("Contract Growers" or "Growers"),[3] ranchers and other farmers who rely on the use of poultry litter.

A preliminary injunction is an "extraordinary remedy" that is rarely given. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1154 (10th Cir. 2001). To prevail, Plaintiffs must demonstrate "(1) a substantial likelihood of success on the merits; (2) irreparable harm absent the requested injunction; (3) that the threatened harm outweighs injury which the injunction will cause Defendants; and (4) the injunction will not be adverse to the public interest." *U.S. v. Power Eng'g Co.*, 191 F.3d 1224, 1230 (10th Cir. 1999).

Whenever a party seeks any sort of preliminary injunction, its "right to relief must be clear and unequivocal." *Dominion Video*, 269 F.3d at 1154. However, certain injunctive requests are particularly disfavored and subject to an even higher standard. Where a movant seeks a preliminary injunction that: (1) alters the status quo; (2) is mandatory rather than prohibitory; or (3) would provide nearly all the relief the movant could secure after trial, the Court must scrutinize the request all the more closely before granting the extraordinary remedy. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc). Such injunctions are deeply disfavored. *Dominion Video*, 269 F.3d at 1155.

Plaintiffs have previously admitted that "our case includes all of these elements that would require heightened proof." Ex. 2 at PI-Olsen0005081-5082 (Sept. 14, 2005 memorandum from Plaintiffs' counsel, David Page to experts outlining applicable legal standards and opinions

[3] Poultry companies "contract with independent growers for the raising or grow-out of…their flocks…." *National Broilers Marketing Ass'n v. U.S.*, 436 U.S. 816, 822 (1978).

to be offered in support of a preliminary injunction motion). Plaintiffs' candid assessment is undoubtedly correct because: (1) the requested injunction would alter the status quo by undoing centuries of agricultural practice, overturning the litter management regulations of two States, and ordering changes Oklahoma has declined to make through its existing regulatory programs; (2) the injunction would require Defendants to take affirmative steps to try to prevent non-parties from land-applying litter; and (3) a preliminary injunction would provide all of the prospective relief Plaintiffs could secure after prevailing on their RCRA claim at trial.

Plaintiffs fail to make any of the required showings by the clear and unequivocal evidence required under this heightened standard. Accordingly, the Motion should be denied.

I. Plaintiffs have failed to demonstrate a likelihood of success on the merits

Plaintiffs have failed to demonstrate a likelihood of success on the merits of their RCRA claim. To the contrary, there are multiple reasons why Plaintiffs' RCRA claim must fail. First, poultry litter is not a "solid waste" within the meaning of RCRA. Second, there is no substantial and imminent threat to human health in the Watershed. Third, Defendants do not "contribute to" the "disposal" of poultry litter. Fourth, Plaintiffs cannot link any specific Defendant or Contract Grower to an ongoing RCRA violation. Finally, Plaintiffs' purported "scientific" evidence is unreliable and biased.

A. Poultry litter is not a "solid waste" within the meaning of RCRA

The Court should summarily deny Plaintiff's Motion because poultry litter is not a "solid waste" under RCRA. *See Safe Air For Everyone* ["*SAFE*"] *v. Meyer*, 373 F.3d 1035 (9th Cir. 2004) (claim for injunctive relief under RCRA failed because switchgrass residue used as a fertilizer is not a solid waste); *Otay Land Co. v. U.E. Ltd., L.P.*, 440 F. Supp. 2d 1152 (S.D. Cal. 2006) (dismissing RCRA claim for injunctive relief as spent ammunition and target debris at a shooting range were not RCRA solid wastes).

1. Congress exempted animal manures from RCRA

RCRA does not apply to animal manures returned to the soil as fertilizer or soil conditioner. Congress specifically addressed this question when it enacted RCRA:

> Waste itself is a misleading word in the context of the committee's activity. Much industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses . . . *Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation*.

H.R. Rep. No. 94-1491, 94th Cong., 2d Sess., at 2, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240 (italics added).

EPA's actions since RCRA's enactment further establish that Congress did not intend RCRA to apply to manures. Consistent with Congress' intent, since the beginning of EPA's efforts to enforce RCRA, the agency has consistently excluded manures destined to be returned to the soil from RCRA's definition of "solid waste." Ex. 3, Williams Aff. ¶¶1, 3, 22-32 (explaining EPA's exclusion of manure from RCRA under her direction as head of the RCRA program and thereafter); Ex. 4, Fortuna Decl. 6-12. EPA's rulemaking in 1979 stated clearly that the criteria the agency was adopting "do not apply to agricultural waste, including manures and crop residues, returned to the soil as fertilizers or soil conditioners." *Criteria for Classification of Solid Waste Disposal Facilities and Practices*, 44 Fed. Reg. 53,438, 53,440 (Sept. 13, 1979). As EPA noted, "[t]his exclusion is based on the House Report … which explicitly indicates that agricultural wastes returned to the soil are not to be subject to the Act." *Id.* *See also* 44 Fed. Reg. 58,946, 58,955 (Dec. 18, 1978) (explaining that EPA retained the agricultural exclusion in its regulatory definition of solid waste "because the need for such an exclusion is so clearly identified in RCRA's legislative history").

EPA has repeated this exclusion several times. *See, e.g.*, EPA, *Report to Congress: Solid*

Waste Disposal in the United States, (Oct. 1988); *see also* Ex. 3, Williams Aff. ¶ 28-32; Ex. 4, Fortuna Decl. 6-12. Indeed, in a recent rulemaking EPA observed that "[l]and application is the most common, and usually the most desirable, method[] of using manure and wastewater because of the value of the nutrients and organic matter they contain." EPA, *Development Document for the Final Revisions to the National Pollutant Discharge Elimination System Regulation and Effluent Guidelines for Concentrated Animal Feeding Operations*, Dkt No. EPA-HQ-OW-2002-0025-0039 at 8-146 (Dec. 2002).

Although RCRA is implemented through a system of federal-state partnership, Congress has delegated to EPA responsibility for interpreting and applying RCRA's definition of "solid waste." *See Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 558 (10th Cir. 1986). Accordingly, EPA's recognition that Congress intended to exclude animal manures from RCRA's definition of "solid waste" merits considerable deference. *Id.*

Not only have Congress and the EPA been clear in the exclusion of animal manure from RCRA, outside of this lawsuit, Oklahoma has followed their lead. Other than the Plaintiffs, no one in Oklahoma's state government has deviated from Congress' clear statement of its intent in enacting RCRA and the EPA's implementation of the statute. Under RCRA, each State promulgates a solid waste management plan that must conform to federal standards and be approved by EPA. 42 U.S.C. §§ 6941-49a; 40 C.F.R., Part 256. Under Oklahoma's RCRA regulations, all solid waste facilities must be permitted by the Oklahoma Department of Environmental Quality ("ODEQ") and solid waste may be disposed of only at such a facility. 27A O.S. § 2-10-301.A.1&2. ODEQ has never treated poultry litter as a solid waste. According to Scott Thompson, Director of ODEQ's Land Protection Division (which has responsibility for Oklahoma's RCRA program), the State has never considered poultry litter to be a solid waste. Ex. 5, Thompson Depo. 18:3-22:25. The State has never issued a notice of RCRA violation for

poultry litter application, *id.* at 41:15-41:19, never ordered anyone to cease and desist from the land application of poultry litter, *id.* at 67:14-67:18, and never issued any regulations treating poultry litter as a solid waste, *id.* at 65:22-66:1. According to Mr. Thompson, "poultry litter is just simply not on [ODEQ's] radar screen." *Id.* at 93:18-93:21. ODEQ is no outlier. *No state* classifies poultry litter as a RCRA solid waste and *no state* treats farms and fields as solid waste disposal facilities.

In sum, Congress' plain statement of intent, EPA's interpretation of RCRA, and Oklahoma's own interpretation of RCRA and conduct outside of this lawsuit make clear that poultry litter returned to the soil as a fertilizer or soil conditioner is not a RCRA "solid waste."

2. Poultry litter is not discarded, but rather beneficially used

Even if Congress and EPA had not specifically excluded animal manures from RCRA, poultry litter would still not be a RCRA "solid waste" because it is not a "discarded material." *See Am. Mining Congress v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987). Plaintiffs incorrectly label litter as "waste" because it contains materials that come out of an animal's digestive tract. However, under RCRA, the terms "excrement" and "solid waste" are not synonymous. RCRA specifically defines "solid waste" as "garbage, refuse, sludge from a waste treatment plant … and any other *discarded material*, including solid, liquid [or] semisolid … material resulting from industrial, commercial, mining and agricultural operations." 42 U.S.C. § 6903(27) (emphasis added). Statutory terms should be "interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co. v. Burton*, 127 S. Ct. 638, 643 (2006). The ordinary meaning of "'discarded' is 'disposed of,' 'thrown away' or 'abandoned'." *Am. Mining*, 824 F.2d at 1184; *see also SAFE*, 373 F.3d at 1041 (defining "discard" as synonymous with "cast aside; reject; abandon; give up") (internal quotation omitted). Courts have made clear that "Congress was using the term 'discarded' in its ordinary sense" and not "in a much more open-ended way." *Am. Mining*, 824

F.2d at 1185.

Plaintiffs argue that poultry litter[4] is a RCRA "solid waste" solely because *a single constituent* of poultry litter— orthophosphate (which Plaintiffs refer to generically as phosphorus)—may not be needed everywhere litter is applied. However, a product is not a RCRA "solid waste" merely because not every single constituent of the product is useful. To the contrary, courts look to whether the product as a whole has some benefit in the use to which it is put. *See, e.g., Zands v. Nelson*, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991). ("[D]iscarded material … clearly … would not include materials that still are useful products"); *No Spray Coalition, Inc. v. City of New York*, 2000 WL 1401458, at *4 (S.D.N.Y. Sept. 25, 2000); 40 C.F.R. § 261.2(c)(1)(B)(ii).[5] Importantly, an allegation that a product causes pollution when used does not make the product a solid waste within the meaning of RCRA. *See No Spray*, 2000 WL 1401458, at *4 (pesticides intended to be sprayed on the ground are not "discarded" under RCRA); 40 C.F.R. § 261.2(c)(1)(B)(ii) ("commercial chemical products … are not solid wastes if they are applied to the land and that is their ordinary manner of use"). For example, lead pellets in shotgun shells are not "waste" even after they are used and fall to the ground, since

[4] Poultry are usually raised indoors in "houses" on a floor covered with bedding. The bedding usually consists of peanut or rice hulls, sawdust, or wood shavings. As each flock is raised, its excrement becomes mixed with the bedding. Contract Growers in Oklahoma and Arkansas typically raise four to eight flocks on a single placement of bedding. Between flocks, Contract Growers remove any caked bedding and place a fresh layer of bedding over the old. Periodically a Contract Grower will clean out the accumulated litter and start afresh. *See* Ex. 6, Ex. 7, Clay Aff. at 4. The resulting material is known as "poultry litter."

[5] Ironically , if the Court were to incorrectly hold that the application of poultry litter by Contract Growers, cattle ranchers, or others in excess of a current crop's needs for a single constituent constituted an inappropriate use of the litter so as to render the farm a significant contributor of pollutants, poultry litter would thereby be removed from the RCRA definition of "solid waste." *See* 42 U.S.C. § 6903(27); 33 U.S.C. § 1342; 40 C.F.R. § 122.23. In such a situation, the relief Plaintiffs seek would violate RCRA's express prohibition on application of RCRA to activities or substances that would be duplicative of or inconsistent with the requirements of the Clean Water Act. *Id.* § 6905(a); *see also* Ex. 3, Williams Aff. ¶¶47-55.

they were being used as intended. *See Otay*, 440 F. Supp. 2d at 1180; *Long Island Soundkeepers Fund, Inc. v. New York Athletic Club*, 1996 WL 131863, at *8 (S.D.N.Y. Mar. 22, 1996).

The Ninth Circuit's opinion in *Safe Air for Everyone* illustrates these principles. The court analyzed the practice of burning of grass residues for fertilizer and held that the residues are "the type of agricultural remnant, used by farmers to add nutrients to soil, that Congress did not consider to be 'discarded.'" 373 F.3d at 1045-46. Importantly, the Ninth Circuit held that even an incidental agricultural benefit took the residue outside of RCRA. *Id.* at 1044.

The plaintiff in *SAFE* made essentially the same arguments that Plaintiffs advance here. Specifically, SAFE argued that the primary purpose of the activity at issue, the burning of grass, was a waste disposal practice. In support of this position, SAFE argued that the smoke generated by the burning indicated that a portion of the grass was being "discarded." In rejecting those arguments, the court noted that the burning of grass residue extended the life of bluegrass fields by providing beneficial nutrients, reducing weeds, insects and disease, and improving sunlight absorption. *Id.* at 1044-45. The court also stated that "[i]t is true that a part of the residue is returned to the soil while a part that is smoke is carried off by air. Yet for materials to be solid waste under RCRA, they must be 'discarded.'" *Id.* at 1046 n.13.[6] "The determination of whether grass residue has been 'discarded' is made independently of *how* the materials are handled" including whether that handling allegedly causes pollution. *Id*. Accordingly, the court concluded that ash and other residues fell outside RCRA's definition of "solid waste." *Id.* at

[6] Plaintiffs incorrectly imply that animal manures are "solid waste" under RCRA unless returned to the same process that generated them. Motion at 12. Hence, under Plaintiffs' view, poultry litter would be exempt only to the extent it was fed back to poultry. This is wrong for several reasons. First, it ignores the clear exemption for poultry litter used as a fertilizer and/or soil conditioner. Additionally, re-use of a by-product in a process separate from that in which it was generated is not "discarding." "[W]e have never said that RCRA compels the conclusion that material destined for recycling in another industry is necessarily 'discarded.'" *See Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1269 (D.C. Cir. 2003) ((citing *Am. Mining*, 824 F.2d at 1185).

1043-45.

Turning to the present case, the overwhelming evidence is that Contract Growers, cattle ranchers and others using poultry litter do not intend to "discard" it. The use of manure as an organic fertilizer or soil conditioner is one of the oldest agricultural practices, dating back thousands of years. *See* Ex. 7, Clay Aff. 4-5. In America, farmers have long used poultry litter to boost crop production and have bought and sold litter. *See, e.g.*, Ex. 8. Poultry litter is the most valuable by-product produced on the poultry farm. Many Contract Growers are also cattle farmers and ranchers. *See* Ex. 9, Littlefield Depo. 40:8-42:19; Ex. 10, Anderson Depo. 3:17-22. In addition to the fee earned for growing the poultry, they also own the resulting litter. Contract Growers either use the litter on their own farms, or sell or barter it to third parties including non-Contract Grower farmers and cattlemen.

Plaintiffs attempt to characterize this as a situation where a company forces its "waste" on others. Nothing could be farther from the truth. As Contract Grower Steve Butler testified, poultry litter is not a "waste," but a valuable commodity that Contract Growers want and use. In fact, when Contract Growers consider whether to enter the business of raising poultry, they take into consideration the fact that they will own the litter and can make money from it:

> Q Did you make any proposals or suggestions to Tyson that you didn't want to be responsible for the waste that's generated by their birds in these complexes?
>
> A Absolutely not.
>
> Q Was that a consideration when you entered into this agreement about what to do with the waste, poultry waste?
>
> A Poultry litter was a consideration.
>
> Q And what is that consideration?
>
> A Well, you've got to take into account you don't know what the future was for litter, but to me it's a commodity. I can sell it, make money.

Ex. 11, Butler Depo. 104:18 - 106:1. *See also* Ex. 15, Zhang Depo., 39:6 - 43:1.

Poultry growers, cattle producers, and other farmers want poultry litter because it helps them grow crops. *See* Ex. 12 at 2; Ex. 13 at 1; Ex. 8, Littlefield Depo. 120:16-121:9; Ex. 11, Ex. 15, Zhang Depo., 36: 10-24. Poultry litter is effective as a fertilizer or soil conditioner for several reasons. First, it has valuable nutrients. *See* Ex. 14. Oklahoma's soil expert Dr. Halin Zhang[7] recognizes that "[m]anure provides nitrogen (N), phosphorus (P), potassium (K), calcium, magnesium, micronutrients and organic matter" for the soil. Ex. 14. *See also* Ex. 15, Zhang Depo. 36:10-15; 39:19 - 40:6. Poultry litter is also advantageous because it is a slow-release fertilizer. Commercial fertilizer, which is usually liquid-based or formulated to dissolve in water, is much more likely to contribute nutrients to water runoff. Ex. 12 at 2. Second, poultry litter has soil conditioning qualities completely distinct from its nutrient value. Poultry litter adds organic materials that improve soil structure by making it more open to air and water and better at retaining moisture. As a result, the soil is more hospitable to plant roots and soil microorganisms. *See* Ex. 14 at 1; Ex. 15, Zhang Depo. 110:25 – 115:15. As Oklahoma states, poultry litter "returns organic matter and other nutrients to the soil, which builds soil fertility and quality." Ex. 6; *see also* Zhang Depo. 110:25 – 115:15. Finally, aside from its nutrient value, poultry litter also serves to lime soils. As Dr. Zhang has noted, "the potential of manure, especially poultry litter, to neutralize soil acidity and raise soil pH is less known…. In Oklahoma, many fields are acidic and animal manure would be [a] good amendment." Ex. 13 at 1.

Given these different beneficial properties, poultry litter is a useful fertilizer or conditioner even for soil that has a sufficient amount of any single nutrient. For example, Dr.

[7] Dr. Zhang is a Professor of Nutrient Management and Director of the State's Soil, Water and Forage Analytical Laboratory at Oklahoma State University. He developed the training and educational program requirements for registration and compliance under Oklahoma's poultry litter land application laws and regulations.

Zhang testified that soil containing enough phosphorus for its current crop will nevertheless still benefit from the other nutrients, pH effects, and organic content from litter applications. Ex. 15 at 110-12, 120, 205. Dr. Zhang is not alone in this view. Gordon Johnson, one of Plaintiffs' retained experts in this litigation, testified that soil will benefit from the other nutrients and organic matter in poultry litter even when it already contains the maximum amount of phosphorus Plaintiffs allege is necessary for plant growth. Ex. 16, at 250:19 – 251:10. Defendants' soil scientist Dr. Frank Coale agrees. Ex. 17, Coale Aff., ¶ 4b.

For these and other reasons, Oklahoma has determined that poultry litter outperforms commercial fertilizer. *See* Ex. 12 at 2. In fact, in a test Oklahoma conducted, "[p]oultry litter not only increased forage yields but also increased protein content over control and commercial fertilizer plots." *Id.* Oklahoma concluded that "[h]igher yields and protein content at similar rates of litter and commercial fertilizer may result from the fact that litter provides a slow release nitrogen fertilizer, improves soil quality, and reduces soil acidity." *Id.* Consistent with this conclusion, Oklahoma's poultry inspector John Littlefield testified that cattle and hay growers in Oklahoma purchase litter because it "grows grass better than commercial" fertilizer. Ex. 9 at 120:16 – 121:9. Oklahoma's other poultry inspector has testified that poultry litter is even more valuable to farmers recently as the costs of commercial fertilizer have been increasing. Ex. 18, Berry Depo., 241:15-19. Even General Edmondson concedes that poultry litter is "an excellent fertilizer. To the extent it is needed as fertilizer it should be applied." Ex. 48, Guymon Daily Herald, May 31, 2006.

The numerous beneficial qualities of poultry litter as a fertilizer and soil conditioner have created a thriving poultry litter market. This market demonstrates that poultry litter is a commodity and not a RCRA solid waste. Both EPA and the federal courts have recognized that a substance that has value in the marketplace is unlikely to be purely refuse. *See*, *e.g.*, *Safe Food*,

350 F.3d at 1269. Poultry litter clearly has value in the marketplace. Contract Growers frequently sell or barter their litter to others. Ex. 7, Clay Aff. at 4. The demand for poultry litter is strong in the Watershed, especially among cattle producers, who apply poultry litter to their fields to increase grass yields. Approximately 50 percent of the poultry litter generated in Arkansas and Oklahoma is used by third parties who have no relationship to poultry production. *See*, *e.g.*, Ex. 19. In fact, the State recognizes there is a significant demand for poultry litter because it is a useful product and not refuse, and the State's agricultural agencies encourage its use as a fertilizer and soil amendment. *See*, *e.g.*, Parrish Depo. at 149:14-20, 218:8 - 219:25. Oklahoma even operates a marketplace to encourage farmers to use poultry litter. *See* Ex 6 (screen shot of market page). The Oklahoma Litter Market, jointly operated by Oklahoma State University, the Oklahoma Conservation Commission ("OCC"), and ODAFF, "serves as a communication link for buyers, sellers and service providers of poultry litter." *Id.* Demand for poultry litter is robust and, in fact, the vast majority of litter transactions take place outside of the state-run marketplace. However, the active market for poultry litter, directed in part by the State of Oklahoma itself, is compelling evidence that litter is not " discarded, disposed of, thrown away, or abandoned.'" *SAFE*, 373 F.3d at 1042 (quoting *Am. Mining*, 824 F.2d at 1190).

In sum, poultry litter cannot be considered a RCRA "solid waste" because the Contract Growers, cattle ranchers and others who apply litter are doing so for a beneficial purpose and intended purpose. The Court should deny Plaintiffs' Motion on this basis alone.

B. The Land-Application of Poultry Litter does not Pose an Imminent and Substantial Endangerment to Human Health

Not only have Plaintiffs failed to show that poultry litter is a "solid waste" within the meaning of RCRA, the application of poultry litter does not constitute an "imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). To prove

endangerment, Plaintiffs must demonstrate either "actual harm" or "the risk of threatened harm." *Burlington N. & Santa Fe Ry. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007).[8] The evidence is clear that the land application of poultry litter results in neither.

1. There is no evidence of increased disease in the Watershed

Despite Plaintiffs' hyperbole[9] about risks to health and the symptoms of various diseases, Plaintiffs cannot identify a single individual who has suffered an illness from contact with poultry litter or constituents from poultry litter. *See* Ex. 21, Harwood Depo. 291:14 - 292:5. While Plaintiffs claim that an "imminent" risk to human health has loomed over the Watershed for some 20 years, Ex. 22, Lawrence Depo. 39-40, the imminence of that alleged risk is contradicted by the failure to manifest in a single case of illness. *See, e.g., Smith v. Potter*, 187 F.Supp.2d 93, 98 (S.D.N.Y. 2001) (the district court considered the absence of a single person "fall[ing] ill due to [bacteria] exposure" to be an important part of its decision to deny plaintiffs' motion for a preliminary injunction under RCRA's citizen-suit provision). Indeed, the Oklahoma Department of Health ("DOH") does not believe an elevated risk exists in the IRW. Ex. 23, Crutcher Depo. 109:16 – 116:3. Moreover, Plaintiffs do not identify a single, specific

[8] Plaintiffs cite *Burlington* for the idea that they need not demonstrate actual harm to prevail. However, the *Burlington* court found that a "substantial endangerment" exists under RCRA only "where there is reasonable cause for concern that someone or something may be exposed to risk of harm by release, or threatened release, of hazardous substances." *Id.* at 1021. The facts in *Burlington* are easily distinguished from this case. *Burlington* involved the continuing migration of a tar-like material that was a known carcinogen. *Id.* at 1018, 1022. Even with those facts, the 10th Circuit did not hold that an injunction should be entered, but simply allowed the plaintiff a chance to prove its RCRA claim at trial. The critical question here is whether Plaintiffs have shown a "reasonable cause for concern" sufficient to entitle them to an injunction before trial on the merits of Plaintiffs' RCRA claim. As explained below, Plaintiffs have failed to meet that burden.

[9] Plaintiffs repeatedly invoke a handful of pathogens, specifically *E. coli* 0157:H7 and the avian influenza virus H5N1. Motion at 7; Teaf Aff. ¶¶17-18; Harwood Aff. ¶6. Avian influenza virus H5N1 has never been found anywhere in the United States. Ex. 19, Harwood Depo. 140-41. Plaintiffs did not even test for the presence of *E. coli* O157:H7, which is associated with cattle. Ex. 24, Dupont Aff. ¶11a; Ex. 21, Harwood Depo. 136**;** Ex. 26, Myoda Decl. ¶21.

person at risk due to groundwater consumption, relying instead on a fog of generalities (*e.g.*, 1,700 groundwater wells) to cloak the true lack of any risk attributable to the land application of poultry litter.

Plaintiffs attempt to overcome their inability to identify an actual victim by pointing to alleged "heightened" incidence rates of salmonellosis and campylobacterriosis in two Oklahoma counties. Motion at 20; Teaf Aff. ¶¶17-19.[10] However, none of the counties in the Watershed exhibit any statistically significant upward trend in these diseases. Ex. 24, Dupont Aff. ¶7d; Ex. 25, Gibb Aff. ¶13 & App. 1-10. Each year there are counties in the Watershed both above *and below* the statewide average. Ex. 25, Gibb Aff. ¶13 & App. 1-10. Indeed, disease rates in several Oklahoma counties located far outside the IRW (and where there are few to no poultry operations) have higher incidence rates than the high counties in the IRW. *Id.* There is no statistical correlation between the raising of poultry in a county and increased incidence of disease. *Id.* At bottom, the data about health and disease rates in the Watershed reflect normal, healthy counties. *Id.*

The DOH, which routinely scrutinizes infectious disease data for clusters or abnormalities, has noted no outbreaks of campylobacteriosis, salmonellosis, or *e. coli* infection. The DOH has never even had to investigate a statistically significant elevation of incidents of these diseases in the counties of the Watershed. Ex. 23, Crutcher Depo. 73:23-74:18, 112-14. Commissioner Crutcher, the head of DOH, knows of no disease outbreaks in the Watershed or

[10] Plaintiffs rely principally on salmonellosis and campylobacterriosis, but also list several other illnesses asserted to be "related to fecal bacteria." This list is misleading. The illnesses on the list are not associated with poultry litter and, contrary to Plaintiffs' suggestion, many of them have nothing to do with recreational water contact. Ex. 24, Dupont Aff. ¶¶6b, 10, & 12. The great majority of intestinal infections are food-caused, not water-borne. Salmonellosis and campylobacterriosis in particular are primarily food-borne. *Id.* ¶6b; Ex. 25, Gibb. Aff. ¶10. In fact, available data disclose no waterborne outbreak of campylobacteriosis or salmonellosis in Oklahoma anytime during 2002-2006. Ex. 25, Gibb. Aff. ¶12.

any public health warnings for swimmers or those relying on well water. *Id.*. at 51-52, 55, 60-62. Based on the epidemiological data and his experience as the head of Oklahoma's public health agency, Dr. Crutcher doubts that there is any relationship between the land application of poultry and increased incidents of campylobacteriosis, *e. coli*, or salmonellosis. *Id.* Dr. Crutcher's position is confirmed by the Plaintiffs' own expert, Dr. Robert Lawrence, who testified that he has seen no evidence of campylobacter or E-Coli 0157 in the waters of the IRW. *See* Ex. 22, Lawrence Depo. 166:11-17.

2. There is no evidence of unusual bacteria levels in the Watershed

Plaintiffs allege that bacteria from poultry litter might infect humans recreating in the Watershed, but greatly exaggerate the actual levels of exposure and opportunities for infection. The truth is that recreational use of the waters in the Watershed is extremely unlikely to result in human disease. Ex. 24, Dupont Aff. ¶¶6a-e, 8, 14. Bacterial levels in the Watershed are not unusual, and are comparable to the thousands of miles of Oklahoma streams outside the Watershed in areas with no poultry farming. These levels do not present a human health hazard. Ex. 27, Sullivan Decl. ¶¶14, 15; Ex. 26, Myoda Decl. ¶30. Ex. 24, Dupont Aff. ¶11c. In fact, the head of Oklahoma's DOH testified that *e. coli*, *campylobacter* and *salmonella* infections are more likely to befall a picnic-goer than a swimmer in the Watershed. Ex. 23, Crutcher Depo. 38:5–39:17; 48:3–48:7; 98:16–98:20; 104:18–105:3. Dr. Dupont agrees. Even in the rare instances where Plaintiffs found pathogenic bacteria in the Watershed, the reported levels were usually too low to cause a risk of infection. Ex. 24, Dupont Aff. ¶6e.

Plaintiffs argue that certain waterways within the Watershed have been listed as "impaired" and that this reflects an "immediate, unacceptable health risk" caused by "bacteria associated with poultry waste." Motion at 19; Harwood Aff. ¶5. However, Oklahoma neglects to mention that it has listed 6,683 miles of rivers all across the state as "impaired" for bacteria.

Ex. 49, *State of Oklahoma 2006 Water Quality Assessment Integrated Report*, Table 4. The vast majority of these waterways are in areas where there is little or no poultry. Ex. 25, Gibb Aff., ¶21. This is not the health crises Plaintiffs suggest, and the link to poultry is nonexistent. Moreover, Oklahoma's water quality standards for bacteria are generally met in the Illinois River and other streams in the Watershed during low flow or normal flow conditions. Ex. 27, Sullivan Decl. ¶¶14b, 18-21. Those standards are sometimes exceeded in single samples taken during high flow conditions during or immediately following intense storms. *Id.* However, because significant recreational use of the river and streams do not occur during high flow conditions and because most recreational use is in unimpaired areas of the IRW, Ex. 28 Dunford Decl. ¶¶8-13; Ex. 29, Caneday Depo. 20:1-21, the bacteria levels present for these brief periods do not present any significant risks to humans. Ex. 25, Gibb Aff. ¶¶34, 37-39. Moreover, most single samples are inadequate to show the condition of a waterbody. Ex. 26, Myoda Decl., ¶17.

Plaintiffs' claims about groundwater contamination are also mere exaggerations. There is no evidence of widespread bacterial contamination of groundwater in the Watershed. Ex. 30, Andrews Aff. ¶ 15. In fact, the percentage of domestic wells contaminated with bacteria in the Watershed is less than that found in most other parts of the United States. *Id.* ¶4(a). Outside of this lawsuit Oklahoma has listed and described "Major Aquifers with Anthropogenic Water Quality Problems or Concerns" in the State. That report makes no statements about any concern about any of the aquifers in the IRW being compromised or threatened by the land application of poultry litter. Ex. 49, *State of Oklahoma 2006 Water Quality Assessment Integrated Report*, at 64-70.

Apart from the bare allegations of experts hired by Plaintiffs' outside counsel, there is no evidence of any substantial threat to human health from bacteria in the Watershed. Ex. 23, Crutcher Depo. 90:15-93:20; 107:13-108:11; 109:16-116:3. To the contrary, State officials

strongly encourage recreation in Lake Tenkiller and its tributaries. *See* Ex. 1. ODEQ has never fielded a single complaint about bacteria levels in the Watershed, much less declared bacterial contamination to be an imminent and substantial endangerment. Ex. 5, Thompson Depo. 45-47; 50. ODAFF's Director of the Agricultural Environmental Management Services Division, Dan Parrish, is not aware of any current complaints of bacterial contamination in the Watershed, nor has ODAFF determined that land application of poultry litter should be stopped. Ex. 20, Parrish Depo. 197:6 – 198:15; 213:12 – 214:6. The OCC likewise has never determined there to be an imminent and substantial endangerment in the Watershed. Ex. 31, Phillips Depo. at 62:24-63:5. The risk on which Plaintiffs premise their motion simply does not exist. Moreover, these examples of agency action (or inaction) are "compelling evidence" against granting Plaintiffs' requested injunctive relief. *Wilson v. Amoco Corp*., 989 F.Supp. 1159, 1181 (D. Wyo. 1998). When there is evidence of a state agency assuring people that it is safe to use certain waters for recreational purposes, even though others may assert that the water is contaminated, a district court may properly conclude that." this evidence demonstrates that no reasonable cause for concern exists that someone or something will be exposed to a risk of harm from the . . . contamination if the Court does not take action." *Id*. at 1181.

C. Defendants Do Not "Contribut[e] To" The "Past Or Present Handling, Storage, Treatment, Transportation, Or Disposal" Of Poultry Litter

Even were poultry litter a RCRA "solid waste" (which it is not), and even if its use created an "imminent and substantial endangerment" (which it does not), Plaintiffs' RCRA claim would still fail. Plaintiffs' claim addresses the land application of poultry litter. But Defendants do not currently land apply litter. While some Defendants may have land applied small amounts of litter in years past, Plaintiffs' injunction addresses only the current use of litter. In fact, Plaintiffs admit that, even under their theory, any litter applied more than a season ago is no

longer an issue. Harwood Aff. ¶ 9. Moreover, with the rare exception of company-owned poultry farms, Defendants do not handle, store, transport, process, buy, or sell–poultry litter.

Instead, poultry litter is beneficially used primarily by Contract Growers, farmers, and cattlemen who are not parties to the litigation.[11] Rather than joining these individuals in the case, Plaintiffs argue that Defendants' contracts and business relationships with Growers "contribut[e] to" the use of litter by these non-parties. But Plaintiffs have made no showing that Defendants control their "handling, storage, treatment, transportation, or disposal" of poultry litter,[12] and without such a showing there can be no "contributing to" liability.[13]

RCRA authorizes suit against any person "contributing to" the "past or present handling,

---

[11] Clearly, a court may neither enjoin parties not before it, nor enjoin those who are for the conduct of those who are not. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945); *U.S. v. Kirschenbaum*, 156 F.3d 784, 794 (6th Cir. 1998); *Alemite Mftr'g Corp. v. Staff*, 42 F.2d 832 (2d Cir.1930) (L. Hand, J.).

[12] As an initial matter, Growers are neither Defendants' employees nor otherwise part of Defendants' corporate operations. Rather, as the Supreme Court has recognized, they are independent contractors who contract with Defendants to provide specified services in exchange for specified benefits. *See Holly Farms Corp.. v. NLRB*, 517 U.S. 392, 400 (1996) (repeatedly referring to growers as "independent contractors" and explaining that when a poultry company "contracts with independent growers for the care and feeding of [its] chicks, [its] status as a farmer engaged in raising poultry ends with respect to those chicks".); *National Broiler Marketing Ass'n v. U.S.*, 436 U.S. 816, 821-22 (1978); *id.* at 833, 837-39 (Brennan, J. concurring) ("judges should not adjust the conflicting interests of growers and [poultry companies]").

[13] Courts have recognized a number of situations in which injunctive relief is wholly inappropriate, all of which apply to this case. Courts have denied injunctive relief where it would be ineffectual. *See Panelko, Inc. v. John Price Assocs., Inc.*, 642 P.2d 1229, 1236 (Utah 1982). Courts have also rejected relief where the requested injunction could not be enforced by the court, *Penn Central Co. v. Buckley & Co., Inc.*, 293 F. Supp. 653, 658 (D.N.J. 1968), where the injunction would be inefficient and inconvenient for the court to administer, *Bray v. Safeway Stores, Inc.*, 392 F. Supp. 851, 868 (D. Cal. 1975), or where enforcement would require continuous judicial supervision. *Dahlberg Brothers, Inc. v. Ford Motor Company*, 137 N.W.2d 278, 314 (Minn. 1965). Courts have also declined to issue an injunction when the injunction would be futile and serve no useful purpose, *Unicon Mgt. Corp. v. Koppers Co.*, 366 F.2d 199, 205 (2d Cir. 1966), and where the injunction would be of no practical benefit to the movant, *Bank v. Bank*, 23 A.2d 700, 704-705 (Md. 1942), because, for example, the injunction could not remedy the harm alleged.

storage, treatment, transportation, or disposal" of a solid waste. 42 U.S.C. § 6972(a)(1)(B). RCRA does not define the term "contributing to," so Plaintiffs urge the Court to adopt the Fifth Circuit's definition, to "have a share in any act or effect." Motion at 14 (quoting *Cox v. City of Dallas*, 256 F.3d 281, 294 (5th Cir. 2001)). Defendants do not disagree with that definition in so far as it goes, but note only that it has nothing to say about RCRA's outer reach. The end user of *any* consumer product could be said to "contribute to" or "have a share in" the improper disposal of production by-products simply by purchasing the product. The same goes for any purchaser of goods or services, yet it cannot be that merely entering a supply arrangement passes along responsibility for a vendor's solid waste practices.

Recognizing the need for a cutting-off point, courts have concluded that RCRA "contributing to" liability does not dispense with traditional notions of causation. *See, e.g.*, *Hudson Riverkeeper Fund, Inc. v. ARCO*, 138 F. Supp. 2d 482, 487 (S.D.N.Y. 2001); *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237, 256 (S.D.N.Y. 1999); *In re Voluntary Purchasing Groups, Inc. Litig.*, 2002 U.S. Dist. LEXIS 20273 (N.D. Tex Oct. 22, 2002); *Zands*, 779 F. Supp. at 1264. With regard to parties such as Defendants, who neither owned, generated, treated, handled, transported or disposed of the alleged waste, "contributing to" liability is supportable only if the Defendant controlled those who did. *U.S. v. Aceto Agricultural Chem. Corp.*, 872 F.2d 1373. 1383 (8th Cir. 1989). In *Aceto*, the Eighth Circuit recognized RCRA's broad grant of remedial authority,[14] yet even the broadest reading of "contributing to" liability did not dispense with the

[14] Plaintiffs cite several authorities for the proposition that RCRA "contributing to" liability is extremely broad. But the cases Plaintiffs cite mostly regard defendants who previously owned or controlled the waste at issue, and who insufficiently assured its proper disposal. *See, e.g.*, *Cox*, 256 F.3d at 293-96 (defendant city's own waste placed in illegal dump); *U.S. v. Valentine*, 885 F. Supp. 1506, 1509 (D. Wyo. 1995) (defendant transported own waste oil to reclaiming facility and dumped unusable portions directly into disposal pits). It is true that RCRA can in limited circumstances hold generators liable for the disposition of their waste after it leaves their control, *see, e.g.*, S. Rep. 96-172, at *5 (1979), reprinted in 1980 U.S.C.C.A.N. 5019, 5023 (a generator

requirement that the Defendants have exercised some control over the offending process. *Id.* The Eighth Circuit reversed the district court's dismissal of a "contributing to" claim for failure to plead control expressly not because a showing of control is unnecessary, but because the evidence in that case permitted the court to infer control. *Id.* at 1383 ("it may reasonably be inferred that [defendant] had authority to control … any waste disposal."). *See also South Fl. Water Mgt. Dist. v. Montalvo*, 84 F.3d 402, 408-09 (11th Cir. 1996) (defendants who contracted for pesticide spraying not liable for "arranging for" disposal of waste because defendants lacked any control). Accordingly, the injunction Plaintiffs request can be granted only to the extent that Defendants exercise control over the use of poultry litter, and control comes only with a demonstration that those who use litter are Defendants' agents.

Agency is an issue of fact, and any such agency relationship must be clearly established with specific evidence:

> An agency relationship will not be presumed, and the burden of proving the *existence, nature and extent* of the relationship ordinarily rests on the party asserting it. An agency relationship generally exists if two parties agree one is to act for the other…. An *essential element* of an agency relationship is that the principal has some degree of *control* over the conduct and activities of the agent.

Estate of King v. Wagoner County Bd. of County Com'rs, 146 P.3d 833, 840 (Okla. App. Div. 2. 2006) (citations omitted). Accord *Oliver Constr. Co. v. Erbacher*, 234 S.W. 631, 632 (Ark. 1921) ("The rule is well established that an agency cannot be presumed, but must be established

---

might be liable where he "had knowledge of the illicit disposal or failed to exercise due care in selecting or instructing the entity actually conducting the disposal"). However, such cases have little to say about RCRA's reach in a case such as this where Defendants are not the generators of the land-applied poultry litter and there is no evidence of Defendants having "knowledge of illicit disposal" by Contract Growers, cattle ranchers or others. The *only* case Plaintiffs cite that does not regard the defendant's own waste is *Aceto*, which, as discussed *infra*, makes clear that RCRA requires a showing that the defendant controlled the discarding of the waste. *Aceto*, 872 F.2d at 1383.

by proof.…"). Finally, agency is defined principally by the contracting parties themselves. *Anglo-American Clothing Corp. v. Marjorie's of Tiburon, Inc.*, 571 P.2d 427 (Okl. 1977); *U.S. Bedding Co. v. Andre*, 150 S.W. 413, 414 (Ark. 1912).

Plaintiffs have come forward with no evidence to support an agency finding. They rest their entire argument on the affidavit of Dr. Robert Taylor, an economist and known crusader against the poultry industry, which he suggests embodies an American economic system that is "slithering towards fascism." Ex. 32, Taylor Depo. 139:17-24. In Dr. Taylor's view, Contract Growers, to whom he refers to as "uninformed, gullible or overly optimistic … Bubbas," are being exploited. *Id.* 153:13-154:14. In reaching his conclusions, Dr. Taylor did not bother to carefully examine Contract Growers' contracts, *id.* 44:13-45:1, nor could he identify any specific basis for his opinion that "independent" Contract Growers are shut out of the Contract Grower market, *id.* 86:23-88:22. He admits to having little understanding of poultry operations in the Watershed, and that his testimony, based on what is "generally true in the whole United States" represents at best an "educated guess." *Id.* 105:18-106:3. Of particular significance, he has never spoken with any Contract Growers in the Watershed regarding how contracts are negotiated, their relationships with Defendants, or the degree of control Defendants exercise over their everyday operations. *Id.* 164:4-166:18.

In stark contrast to Dr. Taylor's biased and uninformed view of their relationships with Defendants, the Contract Growers are independent contractors. Each contract specifically states that the Contract Grower is an independent contractor.[15] Contract Growers consider themselves to be independent. For example, Steve Butler testified he is "definitely an independent" who contracts

[15] Defendants have produced numerous Grower contracts in this action, an example of which is attached as Exhibit 35. *See* TSN36507S0K at ¶ 7 ("Producer is engaged in and is exercising independent employment. Producer is an independent contractor and may join any organization of association of Producer's choice. Producer is not a partner, agent or employee of, or joint venturer with, Company.").

and raises chickens for Tyson. Ex. 11 at 118:23 – 119:1.

Under these contracts, Defendants provide poultry to Contract Growers and pay them a fee for their services. The Contract Growers raise the poultry in their own houses on their own land. While the Defendants retain ownership of the chicks and provide feed, medicine and technical support, the Contract Growers provide and control everything else in this process. The Contract Growers supply the labor, agricultural know-how, equipment, housing, and energy. The Contract Growers decide whether to hire labor to help them with the birds, and select and control those laborers. *See* Ex. 33, Pigeon Depo. 52:1-7, 182:17 - 184:6; Ex. 11, Butler Depo. at 155:23 - 156:10; 237:24 - 240:1; Ex. 34, Loftin Depo. 85:4 - 86:2; Ex. 35 at TSN36507SOK, ¶¶1-4.

Defendants are not present on a daily basis and do not exert operational control over the activities of the Contract Growers on their farms. Ex. 33, Pigeon Depo. 52:1-4 (Q: Generally speaking who has the day-to-day operational control of your facility? A: Myself); 181:16 – 182:4. Rather, Defendants merely provide Contract Growers with basic requirements and suggestions that could improve the Growers' performance and the end product. Ex. 11, Butler Depo. 234:3-4; Ex. 32, Taylor Depo. 82:18 – 82:22 (service technicians are generally present at a farm only "[a] couple of hours once a week.…").

The Contract Growers own their individual farms and poultry houses and, as such, own the physical location of their work, and they provide all of the instrumentalities and tools necessary to raise the poultry that is the end product of their contractual relationship with one of the Defendants. Ex. 33, Pigeon Depo. at 174:7-12. Larry McGarrah, a Contract Grower, testified that no Defendant assisted him directly or indirectly with respect to obtaining financing for his poultry growing operation. Ex. 36, McGarrah Depo. at 167:2-6. Mr. Pigeon, another Contract Grower, testified that there is a mortgage, held by a bank, on his property used in

connection with his poultry growing operation. Ex. 33, Pigeon Depo. at 174:25 – 175:6.

The market for Contract Growers' services is competitive. Contract Growers compete with each other based on their ability to raise poultry to particular specifications and Defendants compete for the services of Contract Growers. This competition is reflected by the differences in fees and other contractual provisions offered by Defendants. The Contract Growers' independence is also evidenced by the fact that Contract Growers can switch Defendants with which they contract, or grow poultry for more than one Defendant at the same time. Indeed, in just the few months since the Motion was filed, numerous Contract Growers within the Watershed have switched from one Defendant to another.

In support of their agency arguments, Plaintiffs point to Defendants' ownership of the birds and technical advice on the manner in which they are raised. Motion at 16-17.[16] Those facts are irrelevant to this case, which relates to Contract Growers', cattle producers', and other farmers' use of poultry litter outside the poultry growing houses. Even assuming Contract Growers were Defendants' agents for purposes of the raising of the birds, which they are not, Plaintiffs fail to consider that agency is task-specific and that "[a] person can be an agent for one purpose, but not for another." *Bell v. Apache Supply Co.*, 780 S.W.2d 529, 530 (Ark. 1989); *Tirreno v. Mott*, 453 F. Supp. 2d 562, 565 (D. Conn. 2006); *Naujoks v. Suhrmann*, 337 P.2d 967, 969 (Utah 1959). The fact that Defendants provide technical assistance to the Contract Growers related to the raising of birds does not transform them into Defendants' agents with regard to their handling, storage, transportation, or use of litter as a fertilizer or soil conditioner. Rather, the record is clear that especially with regard to the tasks that are relevant to this case, the

[16] Plaintiffs suggest that the location of farms, and thus of the land application of litter, is driven by Defendants' placement of their production facilities. Motion at 16-17. Were this the standard, RCRA "contributing to" liability would indeed be unworkably broad as it is not at all unusual for subcontractors to site themselves near their larger customers. Plaintiffs cite no caselaw to support this sweeping theory of liability.

handling, storage, treatment, transportation, and use of poultry litter, Contract Growers are their own masters.

Of particular importance here, Contract Growers decide what bedding material they use and the frequency with which they replace it. When litter is removed from their housing, Contract Growers determine whether to sell or barter the litter or use it on their own land. If they use it on their own land, they decide when, where, and at what rates to apply it. Ex. 11, Butler Depo. at 104:18 - 106:1.

The fact that the Contract Growers own the litter is well known by Oklahoma. The State's poultry inspector testified that decisions about how much litter to apply are made by the Contract Growers or by commercial litter applicators that spread the litter on farms, not by Defendants. Ex. 9, Littlefield Depo. at 53:2-9. Recognizing this, the poultry litter laws in Oklahoma and Arkansas regulate Contract Growers and other end-users of litter, not the Defendants. *See id.* at 20:20 – 24:22; 32:7 - 35:4. Oklahoma's litter inspector believes that most of the growers in northeast Oklahoma take a responsible approach in making their litter management decisions. *Id.* at 43:3-11

Defendants have no control over the Contract Growers' use or sale of litter, and likewise no control over non-Contract Grower farmers or cattlemen. It is these independent contractors and third parties, not Defendants, who use, buy, sell, and profit from poultry litter. *See*, *e.g.*, Ex. 37, Fischer Depo. at 317:13-20 (stating that the owners of litter get the money from its sale and use). Apart from obligating Contract Growers to comply with applicable environmental laws and regulations, the contracts have nothing to say about how or where litter is used. *See* Ex. 35 at TSN36507S0K, ¶ 2(C).

In sum, the facts are clear that for purposes of the handling, storage, treatment, transportation, or land application of poultry litter, Contract Growers are not Defendants' agents.

Separately, there can be no claim that Defendants exercise any control over third-party farmers and cattlemen who purchase litter from Contract Growers. Although these actors stand well outside the scope of Plaintiffs' complaint, Plaintiffs nevertheless seek to control their behavior through their requested injunction. For the Court to find "contributing to" liability, therefore, it would have to adopt an unprecedented and sweeping construction of RCRA that would have the potential to reach anyone contracting with or purchasing services from a party that handles, stores, treats, transports, or disposes of a solid waste. RCRA was not intended to reach so far, and the Court should decline Plaintiffs' invitation.

D. Plaintiffs Cannot Link Any Specific Defendant or Contract Grower to an Ongoing RCRA Violation

Plaintiffs seek an injunction designed to prohibit every Contract Grower, third-party farmer and Defendant from land-applying poultry litter anywhere in the million-acre Watershed. To grant such an injunction under RCRA, this Court would need to find that each and every Contract Grower's litter is a RCRA "solid waste" and that each and every Grower is using litter in a manner that causes an imminent and substantial endangerment. *Prisco v. A & D Carting Corp.*, 168 F.3d 593, 604-05, 608-09 (2d Cir. 1999) (affirming dismissal of RCRA claim because plaintiff "failed to connect 'any individual private defendant to any particular solid waste with known hazardous properties'" on the relevant site). Likewise, to enjoin the hundreds of third parties who apply litter on their cattle ranches and elsewhere within the Watershed, the Court would need to make similar findings against each of them. *Id.* Finally, to obtain an injunction against each Defendant, Plaintiffs must prove that each Defendant is acting in violation of RCRA and show a link between the individual litter applications associated with that Defendant and the

harms Plaintiffs allege on a relevant site.[17] *Id.* This is the normal rule under RCRA, but it has particular force in the context of a preliminary injunction because of the requirement that an injunction must be narrowly tailored to address the matters that have been proven to the Court. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("[T]he remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."); *Garrison v. Baker Hughes Oilfield Op.*, 287 F.3d 955, 961 (10th Cir. 2002) ("It is well settled an injunction must be narrowly tailored to remedy the harm shown.") (citing *Citizen Band Potawatomi Indian Tribe v. Okla. Tax Comm'n*, 969 F.2d 943, 948 (10th Cir. 1992)).

In addition to these requirements, the Tenth Circuit has cautioned that injunctive relief should not be so broad that it limits activity deemed lawful by statutes and regulations. *Garrison*, 287 F.3d at 962-63. Similarly, the Tenth Circuit has held that an injunction should not be "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *NLRB v. Birdsall-Stock. Motor*, 208 F.2d 234, 237 (10th Cir. 1954).

Plaintiffs cannot meet these standards for several reasons. First, Plaintiffs lack evidence with regard to every geographical site in the Watershed. Each parcel of property is distinct. Some fields sit on hills while others are flat. Some fields are bordered by other fields and some by forests, etc. Plaintiffs simply assume a connection between any particular property and their claim of imminent and substantial endangerment. Plaintiffs seek an injunction covering the entire million acres of the Watershed, yet Plaintiffs offer no proof that every one of those million acres is impacted with bacteria from poultry litter or that any of the allegedly impacted areas are

[17] Contrary to Plaintiffs' apparent belief, RCRA does not permit them to pursue an injunction against "the poultry industry." Plaintiffs have not sought to have their RCRA claim certified as a defendant class action under Rule 23, which would permit a fact finder to view the conduct of one Defendant as representative of that of all Defendants. Plaintiffs have asserted individual claims and must prove individual claims.

linked to any unlawful activity at a particular farm. The vast majority of the stream miles in the Watershed have no bacteria problems, Ex. 28, Dunford Decl. ¶¶1-13 & Fig. 2-3. And one of Oklahoma's own witnesses has admitted that there are large areas of land in the Watershed that need poultry litter as a fertilizer because they are lacking nutrients, including phosphorus. Ex. 15, Zhang Depo. 43:13-20. Plaintiffs are asking the Court to force hundreds of nonparties to bear a substantial economic cost and to forego needed fertilizer for their crops without any showing that their current individual practices have anything to do with the risk Plaintiffs allege. Thus, it is clear that Plaintiffs' injunctive request is over-broad and not narrowly tailored to remedy the harms alleged.

Second, for the same reasons, Plaintiffs cannot demonstrate that each and every Contract Grower and third-party farmer in the Watershed is violating RCRA or failing to abide by the poultry litter regulations in Arkansas and Oklahoma. Without proof of violations, those individuals must be assumed to be in compliance. Plaintiffs seek an injunction that would prohibit the customary agricultural activities of hundreds of independent Contract Growers and other third-party farmers who are not before the Court. Plaintiffs have not even provided the Court with the names and locations of each of these individuals, much less proof that each of them has used poultry litter in a manner that violates RCRA.

Finally, Plaintiffs have not provided the Court with proof to support its requested injunction against each Defendant. Plaintiffs' Motion seeks injunctive relief against each Defendant, yet Plaintiffs admit they cannot link a substantial endangerment to individual litter applications by any individual Defendant. Ex. 38, Olsen Depo. 11:15 – 12:7. In sum, Plaintiffs seek to completely prohibit a longstanding agricultural practice of using animal manure as a fertilizer in a million-acre watershed. But to obtain a million-acre injunction Plaintiffs must

prove a link between each person and poultry litter application site to be enjoined and the alleged risk of harm. Plaintiffs cannot meet this high burden.

E. Plaintiffs' unreliable and biased evidence will not support an injunction.

Plaintiffs' claim of endangerment is based on novel and untested scientific theories. The Court must evaluate the reliability of these theories under the traditional *Daubert* standards. Although not all of the rules of evidence apply in this proceeding, *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003), the Supreme Court's admonition against dubious scientific evidence remains binding.[18] Indeed, in view of the high evidentiary burden for a preliminary injunction, the Court must be particularly wary of novel and untested scientific propositions. *O Centro Espirita*, 389 F.3d at 975.

Whether Plaintiffs' witnesses have utilized reliable principles and methods depends, in part, on: (1) whether the opinion has been subjected to testing or is susceptible of such testing; (2) whether the opinion has been subjected to publication and peer review; (3) whether the methodology used has standards controlling its use and known rate of error; and (4) whether the theory has been accepted in the scientific community. *Truck Ins. Exch. v. MagneTek, Inc.*, 360 F.3d 1206, 1210 (10th Cir. 2004). Thus, novel and untested analytical methods and theories are highly suspect.

As explained in detail in the accompanying affidavits, Plaintiffs' essential allegations lack any sound scientific basis. *See* Ex. 30, Andrews Aff. ¶¶4, 14-15; Ex. 24, DuPont Aff. ¶14; Ex. 39 Banner Aff. ¶¶10-11; Ex. 25, Gibb Aff. ¶¶35-39; Ex. 26, Myoda Decl. at ¶¶18-30; Ex. 40, Jaffe Decl., ¶¶21; Ex. 41, Huber Aff. ¶20; Ex. 42, Hennet Aff. ¶¶ 5, 9, 12, 15, 20, 23; Ex. 28

[18] *Daubert* controls even where the Court is the finder of fact. The Court may hear the evidence in the first instance, but must make the normal determination of reliability and exclude evidence that fails *Daubert*. *Seaboard Lumber Co. v. U.S.*, 308 F.3d 1283, 1302 (Fed. Cir. 2002); *Loeffel Steel Prods. v. Delta Brands, Inc*., 372 F. Supp. 2d 1104, 1123 (N.D. Ill. 2005); *Handbook of Federal Evidence* § 103:6 (2007).

Dunford Decl. ¶17. Plaintiffs' methods and data are unreliable, not accepted in the scientific community, and are in several instances demonstrably wrong. Plaintiffs' litigation-driven science provides no cause for concern that poultry litter endangers human health.

1. Plaintiffs' expert opinions are driven by litigation, not science

It should not be surprising that Plaintiffs' science is unreliable as it appears to have been directed principally not by scientists but by lawyers. Expert opinions should receive particular scrutiny when they appear to have been lawyer-directed or dictated, or created primarily for purposes of litigation. *See Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1420-1421, (9th Cir. 1988) ("a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office.") (internal quotations omitted). In 2005, before many of Plaintiffs' experts had even begun working on the case, Plaintiffs' lawyers gave the experts a detailed description of the opinions or conclusions these experts would be expected to offer in support of a future injunction motion under RCRA. *See* Ex. 2, PI-Olsen00005080-86. Specifically, in June 2005, when Dr. Harwood was just at the beginning of her work, Plaintiffs' lawyers wrote that "Jody Harwood will testify that the types and volume of bacteria in environment [sic] is likely from land applied poultry waste." *Id.* at PI-Olsen00005084. Plaintiffs' managing expert, Dr. Olsen, wrote of Dr. Harwood's expected contribution that "the work can be terminated if appropriate results are not found." *Id*. at PI-Olsen00027921. Far from the data driving the science, it is clear that Plaintiffs' legal goals drove the data.

More recently, Plaintiffs' counsel have admitted to the Court their own role in their experts' scientific endeavors. Plaintiffs' counsel have conceded they were "intimately involved in the [expert] process" and giving directions to their experts. Ex. 43, Hearing of Dec. 15, 2006, at 46:19 - 50:18. The Plaintiffs' lawyers directed every aspect of the expert work, including "decisions about where we're going to take a sample, what we're going to sample for, how often

we have to sample it, what analytes we're going to look at." *Id.* at 60:8-60:20. *See also* 62:12-62:22 (same); 64:2-64:9 (same). The lawyers decided which labs and researchers would see which data. *Id.* at 61:1-61:8. As Plaintiffs' counsel informed the Court, Plaintiffs' "scientists [were] *pursuing the scientific course which we have determined for them.*" Transcript of May 17, 2006 motion hearing, at 13:4.

In short, Plaintiffs' scientific support for its Motion was lawyer-conceived and partially lawyer-executed. This is not a case where scientists were asked to provide genuine and impartial research, regardless of its outcome. The Plaintiffs' experts' biased and novel opinions are unreliable and should be disregarded.

Not only were the experts' opinions driven by lawyers, these experts used pseudoscience developed for this litigation. "[C]ourts have discounted the reliability of experts who formed their opinions only within the context of litigation." *Nelson v. Am. Home Prods Corp.*, 92 F.Supp.2d 954, 967 (W.D. Mo. 2000). "That an expert testifies based on research he has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science." *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d, 1311, 1317 (9th Cir. 1995).

It is clear that Plaintiffs' science was developed for this litigation. Indeed, Plaintiffs have admitted as much. For example, based on her work in this case, Dr. Harwood is the first person to claim to discover the bacterium that is the subject of her opinion and the first to assert that this bacteria is a "unique poultry signature." Ex. 21, Harwood Depo. ¶¶ 44:11 – 46:9. Her bacterium is so new it does not even have a name. *Id.* 44:11-14. Dr. Harwood identifies Plaintiffs' targeted bacterium as a form of *brevibacterium*.[19] The Harwood bacterium is not registered in any

[19] Dr. Harwood's affidavit warned the Court of the serious symptoms associated with the bacteria *brevibacterium casei*. Harwood Supp. Aff. ¶2. But Dr. Harwood later admitted that her

scientific database of bacteria. *Id*. 44:15-45:8. Since Dr. Harwood is the only scientist who has ever identified this bacteria, she is the only one who has ever hypothesized about its properties. Similarly, Dr. Olsen testified that he is the first scientist anywhere to have identified a unique "poultry signature" among chemicals that are ubiquitous in the environment. Ex. 38, Olsen Depo. ¶¶ 119:24 – 122:2. Obviously, neither of these novel conclusions has been peer reviewed. Ex. 21, Harwood Depo. 60:3 – 61:14, 218:8-24, 222:9-18, 246:13 - 248:9; Ex. 38, Olsen Depo. ¶¶ 119:24 – 122:2.

2. Plaintiffs' science fails to comply with established protocols

Any reliable environmental analysis must begin with appropriate planning, sampling, and testing. For that reason, regulatory agencies such as EPA promulgate standardized methods to promote test integrity, consistency and reliable analytical results. Ex. 21, Harwood Depo. 53:9-59:19, Ex. 26, Myoda Decl. ¶16. Ex. 44, Churchill Aff. § 2.1. Yet, Plaintiffs' scientific effort is fraught with procedural deficiencies that render Plaintiffs' data meaningless.

Plaintiffs' experts rely heavily on the sampling operation conducted by Dr. Roger Olsen and Camp Dresser & McKee ("CDM"). But CDM failed to follow established protocols in gathering samples. As explained by Jay Churchill, a defense expert who shadowed the sampling, CDM repeatedly violated established sampling protocols and their own operating procedures. Ex. 44, Churchill Aff. §§ 2.1, 3.0. For example, samplers took soil and water samples in close proximity to cow manure or live animals. They repeatedly contaminated equipment and samples with cow manure and human bacteria and failed to decontaminate equipment between sampling sites. Plaintiffs' samplers failed to properly segregate soil samples, improperly stirred up sediments prior to water testing, and took groundwater samples without first adequately purging

---

new bacteria is not *B. casei*, and she has no evidence that the new bacteria is anything other than harmless. Ex. 19, Harwood Depo. 44:11 – 46:9.

and decontaminating the source. They also gathered litter samples that were biased towards more recent fecal deposits. Ex. 44, Churchill Aff. §§ 2.2, 2.3, 2.4. These and other violations have resulted in an unrepresentative, contaminated, and biased body of samples. *Id.* § 3.0. Such samples cannot be used to develop dependable data or sound conclusions. Ex. 27, Sullivan Decl., ¶¶14c, 22-25; Ex. 41, Huber Aff. ¶¶6, 8, 9, 16; Ex. 26, Myoda Decl. ¶17.

Plaintiffs' attempts to track bacteria found in the water to poultry litter applications are equally unsound. Plaintiffs have done nothing more than identify fecal indicator bacteria in the Watershed that are largely harmless and that come from every living animal. To the extent that Plaintiffs found pathogenic bacteria, those bacteria were not present in sufficient quantities to cause disease. Ex. 24, DuPont Aff. ¶¶6a-e, 8, 14. Most importantly, Plaintiffs did not undertake a detailed study of the characteristics of each farm to show whether the bacteria the Plaintiffs found in the streams came from poultry litter applications at that farm or from wildlife, cattle, or some other source. As a result, Plaintiffs' link between the bacteria they found and poultry is merely presumed, not established by evidence.

3. The evidence does not support Plaintiffs' claimed links between bacteria and poultry

Plaintiffs argue that the Court can be confident that alleged pollution downstream does derive from poultry on account of the presence of an allegedly poultry-specific "bio-marker" and a poultry-specific "chemical and bacterial signature." Neither claim is borne out by the evidence.

Microbial Source Tracking ("MST") is the science of tracking microbes present in the environment. The field has been characterized, in Dr. Harwood's words, by "wild optimism," Ex. 45, but that optimism has not been borne out. Accordingly, federal authorities have cautioned against reliance on MST. As the EPA noted in 2005, "[t]o date there is no single

method that could be applied to all types of fecally contaminated water systems." EPA, *Microbial Source Tracking Guide Document*, at 4 (2005). USGS has also cautioned that MST methodologies are often thought initially to be reliable and later determined to be unreliable. *See* also USGS Press Release, *Study Urges Caution in Contaminant Source Tracking* (Dec. 2004) (reporting that MST methodologies previously thought to be 60-90 percent accurate were in fact 20-30 percent accurate). Even Dr. Harwood recognizes that MST research has resulted in "a body of scientific literature that is very difficult to interpret," and that no one method is consistently reliable. Stoeckel & Harwood, *Performance, Design, and Analysis in Microbial Source Tracking Studies*, 73 Applied & Enviro. Microbiology 2405, 2405, 2412 (2007). Indeed, in her words, "the ability of any MST method to quantitatively determine the relative contributions of fecal contamination in a water sample has not been convincingly demonstrated yet." *Id.* at 2411.

Despite these cautions about the novelty of this science and the problem with accepted MST methodologies being revealed as unreliable, Plaintiffs claim to have utilized MST technology to identify a DNA sequence carried solely by a new bacterium that appears ubiquitously in, but yet is unique to, poultry. *See* PI-Harwood00002962-3004, *Identification of a Poultry-Specific Biomarker and Development of a Quantitative Assay*, North Wind Inc. Report (December 2007). Plaintiffs assert that the presence of this bacterium shows the presence of contamination from poultry litter, eliminating the need to study fate and transport of alleged pollution or alternate sources of bacteria.

Dr. Harwood's MST analysis presents several problems. First, the genetic sequence has not been shown to be specific to an individual bacterium. This bacterium is unknown, has no name, and has never been studied in any context outside of Plaintiffs' lawsuit. Second, in order to be an effective source-tracking agent, the bacterium that carries the "biomarker" must be

unique to poultry. However, while the Watershed is home to over 100 different species of animals, including countless waterfowl, deer, birds, reptiles, rodents, etc., Plaintiffs tested the excrement of only five species for their "biomarker": cattle, swine, ducks, geese, and humans. PI-Harwood00002980-81. This falls far short of excluding the alleged biomarker from all other species. Moreover, Plaintiffs found the bacterium in every bird species they tested, not just poultry. Ex. 26, Myoda Decl. ¶22.[20] This invalidates any claim that the bacterium is unique to poultry. Without such host-specificity, Plaintiffs cannot prove that the presence of this new bacterium indicates contamination from poultry.

Plaintiffs' "chemical signature" fares no better than their MST methodology. Plaintiffs' expert Dr. Roger Olsen states that he has discovered a "chemical and bacterial signature" unique to poultry litter that "is present in environmental samples collected throughout the IRW." Olsen Aff. ¶¶ 6, 9. This "signature" appears to be comprised of as many as 24 different organic and inorganic components, which exist naturally in all environments and in the "waste-streams" of virtually every point and non-point source known to exist in the Watershed. Dr. Olsen claims that his sampling and testing for this "signature" has established a direct path from the place of poultry waste disposal to the locations in the IRW where contamination is found. Olsen Aff. ¶ 4.

Dr. Olsen has proved no such thing. At his deposition, Dr. Olsen was unable to link a single "place of poultry waste disposal" to any "location in the IRW where contamination is found," and he conceded that he has not sourced any particular contamination to specific land application sites. Ex. 38, Olsen Depo. 25:21–27:23. Moreover, he conceded, as he must, that none of the components of his "signature" are unique to poultry. *Id.* 253:2-5. As with

[20] Plaintiffs initially found the alleged biomarker in cattle as well, but after retesting discounted the original finding. Dr. Harwood attributed this first positive finding to cross-contamination from a poultry sample. Ex. 19, Harwood Depo 264:19-265:6. Cross-contamination of samples makes Plaintiffs' entire set of work unreliable. Ex. 40, Jaffe Decl., ¶13; Ex. 26, Myoda Decl. ¶22.

Plaintiffs' bacterial case, each "signature" component has many alternate, yet unaccounted for, sources within the Watershed.

Dr. Olsen's "signature" derives from an attempt to perform what is known as a "principle component analysis," or PCA. Dr. Olsen's "signature" appears to derive from his misinterpretation of the results of a PCA analysis. Dr. Olsen is not a statistician and seems to misunderstand PCA and the statistics software package, Systat, used to perform it. When performed correctly, a PCA simply identifies statistical correlations in a given data set. Experienced statisticians understand that it is a "fundamental error to interpret correlation as causality." Ex. 41, Huber Aff. ¶ 11.

Like Plaintiffs' "biomarker," Dr. Olsen's chemical "signature" discovery is a scientific first. Despite decades of research outside of this litigation, no published or peer-reviewed study has ever identified such a "signature" unique to poultry litter. Ex. 38, Olsen Depo. 119:24–120:18. This is unsurprising, as Dr. Olsen's work contains several fundamental errors. Most significantly, by improperly averaging all the sampling data used in his PCA analysis and aggregating data collected from sampling locations over different time periods and during different conditions (*i.e.*, high flow, low flow, etc.), the PCA "results in correlations that are likely incorrect for *any* meaningful subset of data." Ex. 41, Huber Aff. ¶ 10. Moreover, Dr. Olsen failed to account for alternate sources of the same components, or for the fact that different components travel through the same media at different rates. Ex. 27, Sullivan Decl. ¶13. Once statistical and data treatment errors are corrected, the PCA does not "indicate any pervasive, watershed-wide 'signature.'" Ex. 41, Huber Aff., ¶10. In fact, when the data used by Olsen is analyzed by a statistician who understands PCA and the Systat software, "there is no evidence … that just one or two single phenomena, such as poultry litter spreading, can adequately characterize the correlations in these data." *Id.*

In sum, Plaintiffs have produced no reliable scientific evidence sufficient to support the sweeping injunctive relief they seek.

II. Plaintiffs Have Not Demonstrated A Threatened Irreparable Harm That Will Result Absent An Injunction

In addition to a likelihood of success on the merits of its RCRA claim, Plaintiffs must demonstrate by clear and unequivocal evidence that absent an injunction they will suffer irreparable harm. While Plaintiffs have previously admitted that they are required to demonstrate an irreparable harm to obtain a preliminary injunction, Ex. 2 at PI-Olsen0005081-5082, Plaintiffs now argue that they need not do so because they have sued to protect health and the environment. Motion at 20-21. But while Plaintiffs cite the district court decision in *U.S. v. Power Eng'g Co.*, 10 F. Supp. 2d 1145, 1149 (D. Colo. 1998), on appeal in that case the Tenth Circuit reaffirmed the traditional standard, requiring Plaintiffs to demonstrate "irreparable harm in the absence of an injunction" 191 F.3d at 1230.[21] The Supreme Court likewise has not jettisoned the irreparable harm requirement in its own environmental caselaw, *see, e.g.*, *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987), and Plaintiffs' argument has been rejected in the RCRA context, *see U.S. v. Price*, 523 F. Supp. 1055, 1067 (D.N.J. 1981).

The purpose of a preliminary injunction is to maintain the status quo pending judicial resolution of the parties' responsibilities. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); 11 Charles Alan Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 2947 (2d ed. 1995) (an injunction should "preserve the court's power to render a meaningful decision after a trial on the merits."). The mere continuation of the injury alleged in the lawsuit does not by itself constitute irreparable harm. Otherwise, every lawsuit would satisfy this prong. Rather, the

[21] Plaintiffs also cite for this proposition *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1172 (D. Wyo. 1998), but that conflates a discussion of the RCRA merits standard, which regards a risk of harm, with the showing of irreparable harm necessary to justify a preliminary injunction prior to adjudication on the merits.

question is whether Plaintiffs will suffer "irreparable harm in the absence of an injunction," *Power Eng'g*, 191 F.3d at 1230, such that "the judicial process [will be] rendered futile," Wright, *et al.*, § 2947. For example, a preliminary injunction may be appropriate where, without it, "the court would be unable to grant an effective [post-trial] monetary remedy." *Dominion Video*, 269 F.3d at 1156. Plaintiffs have made no such showing.

First, Plaintiffs' conduct militates against granting an injunction. Generally, delay in seeking relief cuts against a finding of irreparable injury. *Kansas Health Care Ass'n v. Kansas Dep't of Social and Rehab. Servs.*, 31 F.3d 1536, 1543-44 (10th Cir. 1994). Here, Plaintiffs delayed not months but years after initiating litigation before requesting an injunction. Plaintiffs' own documents demonstrate that its lawyers planned to seek a preliminary injunction under RCRA as early as mid-2005, but then took two years to attempt to shape their science to fit their legal theory. Ex. 2, PI-Olsen00005080-86 (Plaintiffs' draft plan for seeking a PI under RCRA dated Sept. 14, 2005); PI-Olsen00027912-14 (April 2005 status report regarding plan to search for a poultry-specific biomarker). Despite their asserted public health crisis, during that time Plaintiffs' attorneys neither consulted nor shared any findings with the state officials actually responsible for protecting the public health before filing this lawsuit. Ex. 5, Thompson Depo. 70:4 – 74:14; Ex. 23, Crutcher Depo. 91:15 – 92:10; 109:16 – 116:3. The fact that the Attorney General has never warned any specific well owners about the threat Plaintiffs perceive to their health also says much about the Motion's litigation-driven claim of urgency. *See* Ex. 23, Crutcher Depo. 93:8-13, 109:16 – 116:3.

Second, Plaintiffs' own filing defeats any suggestion of irreparable harm. Plaintiffs' request for a preliminary injunction under RCRA depends entirely on the presence of poultry-related bacteria in the watershed. But fecal bacteria begin to die once released from their host organism and exposed to stresses in the environment. Dead bacteria are harmless. Plaintiffs'

own Motion, and several of its experts, forthrightly admit that, to the extent they were not already dead, a season's rains will remove the relevant bacteria from the Watershed. Motion at 9. Moreover, the land application of poultry litter has been an established agricultural practice in the Watershed for decades. The fact that Plaintiffs cannot identify a single individual who has become sick on account of poultry-related fecal bacteria, Ex. 22, Lawrence Depo. 24:25-25:22, defeats any claim of irreparable harm.

Third, even accepting Plaintiffs' claims, the Motion should still be denied because the Court should "refrain[] from issuing an injunction unless the injunction 'will be effective to prevent the damage which it seeks to prevent.'" *Humble Oil & Refining Co. v. Harang*, 262 F. Supp. 39, 42 (D. La. 1966) (quoting *Great N. Ry Co. v. Local Union No. 2409*, 140 F. Supp. 393 (D. Mont. 1955)). The requested injunction would be directed towards Defendants, not those who actually use poultry litter, which by itself is improper. *Blease v. Safety Transit Co.*, 50 F.2d 852, 856 (4th Cir. 1931) ("It is elementary that a court will not grant an injunction to restrain one from doing what he is not attempting to do and has not done."). *See also Aerated Prods. Co. v. Dep't of Health*, 159 F.2d 851, 854 (3rd Cir. 1947).

Even assuming that Defendants could unilaterally force Contract Growers and other third parties with whom they have no relationship to halt the use of poultry litter in the Watershed, Plaintiffs make no credible effort to account for alternate sources of bacterial contamination. As explained above in detail, it is far more likely that bacteria in surface waters and well water derive from other, more proximate, animal sources, storm water, poor well construction, and septic systems than from poultry farming. *See also* Ex. 40, Jaffe Decl. ¶¶13-14, 19. In fact, Plaintiffs' lead environmental expert, Roger Olsen, could not guarantee that the injunction sought would result in water quality standards for bacteria being met. Ex. 38 Olsen Depo. 6:23 –

7:5.[22] Thus, stripped of its hyperbolic tone and flawed, misleading science, Plaintiffs' Motion has presented no proof of causation of any poultry-specific irreparable injury. Plaintiffs' failure to establish any causal link between the land application of poultry litter and alleged bacteria levels in the Watershed, and the fact that state agencies have repeatedly identified numerous other sources as significant contributors of bacteria in the Watershed, warrants denial of Plaintiffs' request for extraordinary injunctive relief. *See Wilson*, 989 F.Supp. at 1180 (denying plaintiffs' request for preliminary injunctive relief against defendant in a RCRA citizen-suit because of plaintiffs' "causation difficulties" with respect to the defendant, and the fact that the state's environmental agency, and the defendant's experts, had identified several other potential sources of the contamination).

Lastly, it is important to remember that Plaintiffs are no ordinary citizen-plaintiffs. In contrast to ordinary citizens, Plaintiffs embody the enforcement power of the State of Oklahoma. If conditions in the Watershed truly presented a threat to public health, Plaintiffs possess ample authority to protect the public and put into place the precise relief that they ask of this Court. For example, since filing this lawsuit, the State has used proper regulatory and administrative processes to address perceived state-wide problems of bacteria levels in surface waters in multiple watersheds – except the IRW. During the past eighteen (18) months, the State has issued eight Total Maximum Daily Load ("TMDL") Reports for numerous other "impaired" waterbodies in Eastern and Western Oklahoma in an effort to reduce the levels of bacteria found in several streams and rivers.[23] Required under the Clean Water Act, these TMDL Reports

[22] Similarly, Dr. Robert Lawrence, another of Plaintiffs' experts, testified that he could not guarantee that a moratorium on poultry litter land application would translate into compliance with Oklahoma's primary body contact water quality standard. *See* Ex. 22, Lawrence Depo. 211:4-12.

[23] ODEQ, "Final Bacteria Total Maximum Daily Loads for the Washita River, Oklahoma (OK310800, OK310810, OK310820, OK310830, OK310840" (September 17, 2007); ODEQ,

calculate "total maximum daily loads" of bacteria in watersheds from *all* sources and then calculate the percent reduction from *all* sources that must be achieved to allow the water to satisfy the State's water quality criteria. According to ODEQ,

> [e]levated levels of bacteria above the [water quality standards] for one or more of the bacterial indicators result in the *requirement* that a TMDL be developed. The TMDLs established in this report are a *necessar***y** step in the process to develop the bacteria loading controls needed to restore the primary body contact recreation use designated for each waterbody.

ODEQ, "Final Bacteria Total Maximum Daily Loads for the Washita River, Oklahoma OK310800, OK310810, OK310820, OK310830, OK310840" (September 17, 2007) (emphasis added). The fact that Oklahoma has not fulfilled the TMDL "requirement" for the IRW should cause this Court to seriously question the motives of the Plaintiffs in this litigation, and as to their Motion.

Moreover, to the extent that the Watershed waters contain an unacceptable level of fecal indicator bacteria, the State would do better to address cattle, wildlife, and human sources, which contribute waste directly to the surface and groundwater supply. Ex. 26, Myoda Decl., ¶¶13, 19; Ex. 7, Clay. Aff. 10-11; Ex. 40, Jaffe Decl. ¶¶13-14, 19. The TMDL process does just that. Enjoining the use of poultry litter is unlikely to significantly ameliorate the asserted harm. Thus, Plaintiffs have failed to identify an injury that will be irreparable in the absence of an injunction

---

"Final Bacteria Total Maximum Daily Loads for OK410400, OK410600, OK410700 in the Boggy Creek Area, Oklahoma" (September 10, 2007); ODEQ, "Final Bacteria Total Maximum Daily Loads for Canadian River, Oklahoma (OKWBID 52062)" (September 2006); ODEQ, "Final Bacteria Total Maximum Daily Loads for OK410210, OK410300, OK410310 in the Little River Area, Oklahoma" (September 10, 2007); ODEQ, "Final Bacteria Total Maximum Daily Loads for the Lower Red River Area, Oklahoma (OK311100, OK311200, OK311210, OK311300, OK311310) (September 17, 2007); ODEQ, "Draft Bacteria Total Maximum Daily Loads for the Neosho River Basin, Oklahoma (OK121600)" (July 2007); ODEQ, "Draft Bacterial Total Maximum Daily Loads for OK220100, OK220200, OK220600 in the San Bois Creek Area, Oklahoma" (June 2007); and ODEQ, "Draft Bacterial Total Maximum Daily Loads for the Upper Red River Area, Oklahoma (OK311500, OK311510, OK311600, OK311800)" (July 2007).

or that is remediable by an injunction. *See Leeke v. Timmerman*, 454 U.S. 83, 86-87 (1981) (finding no redressability and therefore no standing where injunctive relief sought would not "guarantee" cessation of harm alleged).

III. Any Injury To Plaintiffs Is Greatly Outweighed By The Harms An Injunction Would Create

Plaintiffs must also demonstrate that the alleged harm greatly outweighs the harm their proposed injunction would cause. Plaintiffs try to avoid this prong as well, arguing that a sovereign plaintiff may secure an injunction without first demonstrating that the balance of harms tips in its favor. Motion at 22. But Plaintiffs' authorities all concern *permanent injunctions* entered after an assessment of liability on the merits, not *preliminary injunctions* as Plaintiffs request. *See U.S. v. Marine Shale Proc.*, 81 F.3d 1329, 1335, 1358-59 (5th Cir. 1996) (injunctions following bench trial); *U.S. v. Bethlehem Steel*, 38 F.3d 862, 864 (7th Cir. 1995) (permanent injunction issued after partial grant of summary judgment); *EPA v. Environ. Waste Control Inc.*, 917 F.2d 327, 331 (7th Cir. 1990) (permanent injunction issued after determination of liability at trial); *Environ. Defense Fund v. Lamphier*, 714 F.2d 331, 355 (4th Cir. 1983) (same); *Illinois v. City of Milwaukee*, 599 F.2d 151, 154-55 (7th Cir. 1979) (same). Enjoining one who has been judged liable for polluting is a far different thing from enjoining one who has not. Indeed, a preliminary injunction is "extraordinary" precisely because the party against whom it operates has not yet been found liable. Thus, the traditional test remains in place and Plaintiffs must demonstrate "that the threatened harm outweighs injury which the injunction will cause defendants." *Power Eng'g*, 191 F.3d at 1230.

As discussed above, Plaintiffs have not shown any irreparable injury. In contrast, the harm that would be caused by the sweeping injunctive relief Plaintiffs seek is clear and substantial. An injunction would impose substantial costs on third-parties and the regional

economy.[24] Specifically, it would force significant hardship on the Contract Growers, cattle ranchers, and other farmers. Contract Growers would be stripped of their right to sell, barter, or use their litter. Consequently, they would lose a portion of their income and be forced to pay for commercial fertilizer. Cattle ranchers and other farmers would lose the ability to buy poultry litter, which would force them to buy more expensive and less effective commercial fertilizer. Oklahoma recognizes poultry litter as the preferable economic option for farmers and maintains an online calculator for farmers to estimate the respective costs of litter and commercial substitutes, thereby encouraging litter use. *See* Ex. 46.

Forage producers as a whole would lose $15.6 million during the first year of an injunction. Ex. 47, Rausser & Dicks Aff. ¶21. In light of their increased fertilizer cost, compounded by lost revenue from foregone litter sales, and increased costs of storage, transportation, and disposal of litter, forage producers will likely use less fertilizer than necessary. This would result in further losses from decreased forage production of between $7.9 and $15.8 million the first year. *Id.* ¶22. Reduced forage in turn means reduced cattle production, which Drs. Rausser and Dicks calculate at $20 to $40 million in the first year. *Id.* ¶23. Collectively, this could constitute a financial loss in the Watershed counties of between $39 and $77 million during the first year of an injunction. In short, the requested injunction could

[24] Plaintiffs' casual suggestion that litter could merely be trucked from the Watershed for a few pennies is ill-conceived and inconsistent with Plaintiffs' own legal theory. Motion at 23. If poultry litter is a RCRA solid waste as Plaintiffs assert, then by law the Court *must* order that it be sent to a permitted RCRA landfill or incinerator, not trucked and dumped as Plaintiffs suggest. Ex. 5, Thompson Depo. 77-78; 27A O.S. § 2-10-301.A.1-A.2. Even if this were not the law under RCRA, Oklahoma's experts recognize that there are no economically viable alternatives to the current uses of poultry litter within 100 miles of the Watershed, and that litter should not be trucked more than 100 miles. Ex. 15, Zhang Depo. 30-34, 36-37. And this does not even reach the question of who would be willing to buy and use poultry litter that a court has deemed an "imminent and substantial danger to human health."

force many farmers out of business entirely, and will dramatically and negatively impact the regional economy.

Additionally, federal courts should hesitate to use their extraordinary injunctive powers where the State party requesting the injunction is capable of achieving the same results through its own political and administrative processes without the court's intervention. Oklahoma officials have ample power to abate public health threats without notice or hearing. Specifically, ODEQ is authorized to immediately redress public health emergencies. 27A O.S. § 2-3-502.E. The DOH may "investigate conditions as to health, sanitation, and safety of … places of public resort" and "take such measures as deemed necessary by the Commissioner to control or suppress, or to prevent the occurrence or spread of, any communicable, contagious or infectious disease … and abate any nuisance affecting injuriously the health of the public or any community." 63 O.S. § 1-106.B.1. This is particularly true here given RCRA's deference to state regulatory action.[25]

Of course, in the context of this case the State's authority to immediately order a stop to activities creating a human health risk only supplements the State's authority to license the land application of poultry litter. As discussed below, farmers and professional poultry litter applicators cannot use litter as a fertilizer and soil conditioner without the State's blessing (in the form of a plan for the particular property and a license). If the State, outside of this lawsuit, perceived any genuine threat to public health from poultry litter, the State could immediately stop permitting its use, while taking appropriate steps to prevent dangerous water recreation and use of contaminated wells. This ability, lying unused by the State, ought to give the Court pause.

[25] *See Hallstrom v. Tillamook County*, 844 F.2d 598, 601 (9th Cir. 1987) ("Section 6972(b) and its legislative history reflect Congress's belief that the citizen-plaintiff working with the state or the EPA can better resolve environmental disputes than can the courts. …Litigation should be a last resort only after other efforts have failed.").

IV. An Injunction Would Be Adverse To The Public Interest

Finally, granting Plaintiffs' requested injunction would be counter to the public interest. Ignoring entirely the practical effects of their requested injunction, Plaintiffs focus solely on its asserted environmental impact. Motion at 23-24. Defendants do not dispute the public's interest in an unpolluted environment, but as explained above, Plaintiffs have not proven that their requested injunction would have any quantifiable environmental benefits. But even accepting them *arguendo*, Plaintiffs' view of the "public interest" as encompassing solely environmental concerns is too narrow.

Of particular importance to the public interest analysis are the views of Oklahoma and Arkansas lawmakers, who must balance competing public interests on a daily basis, and of the Oklahoma and Arkansas officials actually charged with enforcing agricultural and environmental protections in the Watershed. The fact is that both Arkansas and Oklahoma law already provide for comprehensive administrative schemes that address the types of concerns raised in Plaintiffs' motion, but also balance them with the State's economic wellbeing. Granting the requested injunction would supplant these regulatory schemes with the Court's own oversight.

Both Oklahoma[26] and Arkansas[27] extensively regulate poultry litter use, and each requires a permit before any litter may be land-applied. Both sets of rules expressly balance economic

---

[26] *See* 2 O S. §§ 10-9 *et seq.* (Oklahoma Registered Poultry Feeding Operations Act); 10-9.13 *et seq.* (Oklahoma Poultry Waste Transfer Act); 10-9.16 *et seq.* (Oklahoma Poultry Waste Applicators Certification Act); 10-9.22 *et seq.* (Educational Programs on Poultry Waste Management); 2 O.S. 20-1 *et seq.* (Oklahoma Concentrated Animal Feeding Operations Act); OAC §§ 35:17, subchapter 5 (regulations implementing the Oklahoma Registered Poultry Feeding Operations Act); 35:17, subchapter 7 (regulations implementing the Oklahoma Poultry Waste Applicators Certification Act); 35:17, subchapter 3 (regulations implementing the Oklahoma Concentrated Animal Feeding Operations Act).

[27] *See generally* Ark. Code Ann. § 15-20-901 (Arkansas Poultry Feeding Operations Registration Act); § 15-20-1001 (Arkansas Soil Nutrient Management Planner and Applicator Certification Act); § 15-20-1101 (Arkansas Soil Nutrient Application and Poultry Litter Utilization Act); § 15-20-1201 (Surplus Nutrient Removal Incentives Act).

and environmental concerns. *See* OAC §§ 35:17-5-1; Ark. Code Ann. § 15-20-902(1)&(2).

Oklahoma Contract Growers must register with the State, and file a farm-specific, professionally-developed plan demonstrating that litter use will neither cause a nuisance nor pollute the State's waterways. *See, e.g.*, 2 O.S. §§ 10-9.3, 10-9.5.B.5; 10-9-7; OAC §§ 35:17-5-3(a)&(b), 35:17-5-5. Multiple state agencies have the authority to address violations of Oklahoma's litter regulations, and non-compliance can result in permit revocation, heavy fines, and imprisonment. *See* 2 O.S. §§ 10-9.11.A.1, B.1.a & B.4, 10-9.12.

Arkansas Contract Growers must register annually with the State, reporting their location, poultry stock, litter management system, and any litter use, sale, transfer, or land application. Ark. Code Ann. §§ 15-20-904(b); 138-00-019 Ark. Code R. § 1902.3. Land application of litter is specifically prohibited in Benton, Crawford, and Washington Counties without an approved Poultry Litter Management Plan ("PLMP") and state certification. Ark. Code Ann. §§ 15-20-1108; 138-00-022 Ark. Code R. § 2202.3. Each PLMP is site-specific and must contain extensive information about the poultry growing operation and the lands where litter is applied.[28] Ark Code Ann. § 15-20-1107; 138-00-022 Ark. Code R. § 2203.3.B. Operators must keep detailed records including soil and litter tests, application rates, and any litter spills. *Id.* § 2204.4.

[28] Plans include the location and legal description of the lands (complete with aerial photographs); the type, number and weight of poultry at the operation, as well as the phases of production, length of confinement and amount of poultry litter generated; type and capacity of poultry litter storage facilities; individual field maps marked with setbacks, buffers, surface waters and environmentally sensitive areas; soil type, crop type, crop rotation practices, expected target yields and the expected nutrient uptake amount of those crops; land treatment practices; a description of the application equipment; the expected application seasons and the number of days per season when poultry litter will be applied; the estimated acres needed to apply all of the poultry litter generated by the poultry feeding operation; and the application rates for nitrogen, phosphorus and potassium based on testing of the soil and litter to be applied. 138-00-022 Ark. Code R. § 2204.1A. Litter may not be applied when soil is saturated, frozen, or covered in ice or snow, and under no circumstances may litter "be applied in any matter that will allow excessive Nutrients to enter Waters Within the State or to run onto adjacent property." 138-00-022 Ark. Code R. § 2202.4.C & D.

Arkansas officials are likewise empowered to redress breaches of these rules, and violations can result in steep fines. *See* 138-00-019 Ark. Code R. § 1903.3.A; 138-00-022 Ark. Code R. § 2206.3.A. The Arkansas Natural Resources Commission is empowered to immediately abate threats to human health. Whenever the "Commission finds that the public health, safety, or welfare imperatively requires emergency action" it may issue an order summarily suspending, limiting or restricting the application of poultry litter pending an adjudicative hearing. 138-00-020 Ark. Code R. §§ 2006.4, 2107.4. Similar to Oklahoma, aside from poultry-specific regulations, the Governor and State Board of Health may also abate nuisances and stop the spread of infectious diseases. See, *e.g.*, Ark. Code Ann. §§ 20-7-110(b), 20-7-113(b).

Were the Court to grant Plaintiffs' motion, the Court would be overruling the considered judgment of two state legislatures that litter may be legally applied but controlled to minimize environmental impacts. Moreover, "[c]ourts should be, and generally are, reluctant to issue 'regulatory' injunctions, that is, injunctions that constitute the issuing court an ad hoc regulatory agency to supervise the activities of the parties." *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies*, 970 F.2d 273, 277-278 (7th Cir. 1992). These policy considerations, combined with the tremendous social and financial costs that would attend issuing an injunction counsel strongly against doing so.

CONCLUSION

Plaintiffs have failed to support any of their claims. Plaintiffs have failed to prove that the Watershed is severely polluted with pathogenic bacteria, that these bacteria came exclusively from poultry litter and not humans, livestock, or wildlife, or that these bacteria render the waters dangerous to human health. Plaintiffs have failed to show the State cannot address this alleged problem on its own and must petition this Court for an unprecedented injunction. Finally,

Plaintiffs have failed to show that poultry litter is a "solid waste" under RCRA or that Defendants are contributing to a violation of RCRA.

Plaintiffs' Motion asks this Court to do something that no Court has ever done. To grant Plaintiffs' Motion, the Court would be required to disregard the plain intent of Congress and the EPA, enjoin hundreds of non-parties, and stop a centuries-old agricultural practice across a million acres. Plaintiffs have offered the Court no basis for such an extraordinary measure.

For the foregoing reasons, Plaintiffs' Motion should be denied.